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18 **IN THE UNITED STATES DISTRICT COURT**  
19 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

20 In re SFPP Right-of-Way Claims

21 CASE NO. SACV 15-00718 JVS  
22 (DFMx)

23 **PLAINTIFFS' BRIEF REGARDING**  
24 **UNION PACIFIC'S REFUSAL TO**  
25 **SEARCH FOR AND PRODUCE**  
26 **RELEVANT DISCOVERY**

27 **JURY TRIAL DEMANDED**  
28

1 Pursuant to this Court's request at the June 23, 2016, informal telephone  
2 conference, Plaintiffs submit this brief explaining how the relevance of their  
3 requested discovery far outweighs any burden on Union Pacific Railroad Company  
4 ("Union Pacific") to conduct a reasonable search and produce responsive  
5 documents. Plaintiffs thus respectfully request this Court to compel Union Pacific  
6 to produce documents responsive to Plaintiffs' Requests for Production Nos. 9 and  
7 28, or alternatively, permit Plaintiffs the opportunity to inspect responsive  
8 documents in Union Pacific's possession, custody, or control.

### 9 I. INTRODUCTION

10 Union Pacific refuses to search for key documents Plaintiffs requested,  
11 instead complaining the burden of producing "decades-old" documents outweighs  
12 any "potential benefits." But apparently this generalized and unsupported alleged  
13 burden is not so great as to prevent Union Pacific from searching for and  
14 producing hundreds of historical letters and other documents spanning from at least  
15 the early 1960s that it believes support its claims and defenses. In light of Union  
16 Pacific's self-serving, selective searching for records, Union Pacific's complaints  
17 of undue and disproportional burden should be viewed with skepticism.

18 Nevertheless, even taking into account Union Pacific's purported burden of  
19 complying with its discovery obligations, the relevance and importance of the  
20 requested discovery necessitates its production. Further, considering the  
21 importance of the property rights at stake in this litigation, the hundreds of millions  
22 of dollars in controversy, that Defendants are the only entities with access to the  
23 requested discovery, and that Union Pacific is a multi-billion dollar, Fortune 200  
24 company that can easily cover the costs associated with producing documents it  
25 has maintained, the proportionality analysis strongly favors the production of  
26 documents responsive to Requests 9 and 28.

## II. FACTUAL BACKGROUND

This lawsuit is a putative class action alleging that Union Pacific illegally granted easements of the subsurface under its railroad right-of-way to Kinder Morgan to construct and operate a high-pressure petroleum pipeline, and has since collected millions of dollars in rent payments that Plaintiffs—adjacent landowners—claim is owed to them.<sup>1</sup> *See, e.g.*, Doc. 104 at ¶¶ 50 & 68. The original arrangements providing for rent payments from Kinder Morgan’s predecessors to Union Pacific’s predecessors occurred when both companies fell under the same corporate umbrella, meaning much of the Defendants’ corporate history is interrelated. *Id.* at ¶ 27.

Plaintiffs allege that Union Pacific recognized it did not have sufficient property interests in its subsurface to grant easements for the construction and operation of a petroleum pipeline, but nevertheless granted such easements to its sister company at the time—the present day Kinder Morgan. Doc. 104 at ¶ 60. Plaintiffs further contend that Defendants operated in such a fashion as to conceal that they were trespassing on the adjoining landowners’ property. *Id.* at ¶ 67. Union Pacific denies these allegations. *See* Doc. 135 at ¶¶ 60 & 67. Moreover, Defendants assert that Plaintiffs’ claims are barred by, among other affirmative defenses, limitations and laches. *See* Doc. 133 at 31 & Doc. 135 at 21. Additionally, Union Pacific filed counterclaims seeking relief that it “has all rights and interests in its railroad right-of-way” under the 19th century congressional land grants. Doc. 182 at ¶¶ 23-24. But this Court dismissed with prejudice Union

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<sup>1</sup> Union Pacific has filed multiple lawsuits against the Kinder Morgan defendants seeking an increase in rent payments for the use of the subsurface beneath its right-of-way for the operation of the pipeline. The latest lawsuit is referred to herein as the “Rent Action.” The Rent Action culminated in a decision from the California Court of Appeal that held Union Pacific did not have sufficient property rights to lease the subsurface beneath its right-of-way. *See Union Pacific Railroad Co. v. Santa Fe Pacific Pipelines, Inc.*, 231 Cal. App. 4th 134 (2014).

Pacific's counterclaims because Union Pacific does not have sufficient property rights under the congressional acts to grant easements to Kinder Morgan. Doc. 175 at 14. Importantly, although Union Pacific's current pleading contains no allegations that the pipeline serves a railroad purpose by providing the railroad diesel fuel, this Court specifically found "even if Union Pacific had plead these facts, the Court would still conclude that its first and second counterclaims, to the extent Union Pacific relies on the 19th century congressional grants, fail as a matter of law." *Id.* at 13.

On February 12, 2016, Plaintiffs served their first requests for production; two of which seek documents relating to Union Pacific's title, and knowledge thereof, as well as, the value of the pipeline:

**REQUEST NO. 9:**

All documents showing or referencing negotiations between the Pipeline Defendants and the Railroad Defendant concerning the title records, agreements, contracts, easement agreements, documents, and court decrees requested in the preceding Request.<sup>2</sup>

**REQUEST NO. 28:**

All communications between the Pipeline Defendants and the Railroad Defendant concerning the value of the Pipeline or the value of the Line.

Union Pacific refuses to search for documents responsive to these requests. At the informal telephone conference before this Court, Union Pacific's counsel informed the Court that any responsive documents would likely be stored in hardcopy form in two offsite storage facilities in Omaha, Nebraska or possibly at an offsite storage facility in San Francisco, California and "are not readily accessible, if at all."

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<sup>2</sup> Request 8 seeks documents showing how the Pipeline Defendants (Kinder Morgan and related companies) obtained their alleged interest in the railroad right-of-way at issue here.

### III. ARGUMENT AND AUTHORITIES

#### A. LEGAL STANDARD

Federal Rule of Civil Procedure 26(b) provides that parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. *Menell v. Rialto Unified Sch. Dist.*, No. EDCV152124VAPKKX, 2016 WL 3452920, at \*2 (C.D. Cal. June 20, 2016) (citing Fed. R. Civ. P. 26(b)(1)). Relevant information "need not be admissible in evidence to be discoverable." Fed. R. Civ. P. 26(b)(1).

The Rules Committee has made clear in its Notes on the 2015 Amendments that "[t]he present amendment restores the proportionality factors to their original place in defining the scope of discovery" and "reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses or objections." *See* Fed. R. Civ. P. 26, advisory committee's note to 2015 amendment. The Committee further explained that "[r]estoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality." *Id.* Thus, while the language of the Rule has changed, the amended rule does not actually place a greater burden on the parties with respect to the discovery process, including the obligation to consider proportionality, than did the previous version of the Rule. *Dao v. Liberty Life Assurance Co. of Boston*, No. 14-CV-04749-SI (EDL), 2016 WL 796095, at \*3 (N.D. Cal. Feb. 23, 2016); *see also Robertson v. People Magazine*, 14 Civ. 6759 (PAC), 2015 WL 9077111 at \*2 (S.D.N.Y. Dec. 16, 2015) (noting that

1 proportionality has been a limit on discovery since the 1983 amendments to Rule  
2 26).

3 Significantly, the burden of proof remains on the party resisting the  
4 discovery—here, Union Pacific. *See Sater v. Chrysler Grp. LLC*, No. EDCV 14-  
5 00700-VAP (DTBx), 2016 WL 3136196, at \*1 (C.D. Cal. Mar. 4, 2016) (“The  
6 party resisting discovery has the burden to show discovery should not be permitted  
7 and has the burden of clarifying, explaining, and supporting its objections.”) (citing  
8 *Duran v. Cisco Sys., Inc.*, 258 F.R.D. 375, 378 (C.D. Cal. 2009) and *Blankenship v.*  
9 *Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)). Union Pacific cannot carry this  
10 burden considering the requested discovery relates to central, hotly contested  
11 issues, the large amount in controversy across this multi-state litigation, the  
12 important issues at stake, and Union Pacific’s inability to show that complying  
13 with the requested discovery presents an *undue* burden or that the burden  
14 outweighs the benefit.

15 **B. THE REQUESTED DISCOVERY IS PROPORTIONAL TO THE NEEDS OF THIS**  
16 **MULTI-STATE CLASS ACTION LITIGATION<sup>3</sup>**

17 **1. The Discovery is Highly Relevant to Plaintiffs’ Claims**

18 Both disputed discovery requests seek information that goes to the heart of  
19 Plaintiffs’ claims. Request 9 seeks documents relating to the nature of Union  
20 Pacific’s subsurface property interest. Every claim and many defenses require a  
21 determination as to whether the railroad has sufficient property rights to use the  
22 subsurface of its right-of-way for a commercial petroleum pipeline. Further,  
23 documents showing how the pipeline defendants obtained the alleged right to  
24 construct a pipeline underneath the railroad’s right-of-way are relevant because

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25 <sup>3</sup> In addition to this lawsuit, related class action lawsuits are pending in Arizona,  
26 New Mexico, and Nevada. The parties in the related cases reached an agreement  
27 that documents produced in any of the actions would be treated as if produced in  
28 all of the actions. *See* Doc. 123 at 7. This means Union Pacific’s refusal to produce  
relevant discovery in this lawsuit affects all four class actions.

1 Plaintiffs assert the pipeline defendants do not have a right to operate a pipeline on  
2 their property. Likewise, Defendants' knowledge of the railroad's interest is  
3 crucial, for example, to show Defendants are trespassing intentionally. Moreover,  
4 any negotiations between Defendants will provide evidence regarding the value of  
5 the pipeline and right-of-way, including the amount of rent payments demanded by  
6 the railroad.

7       Additionally, Defendants' knowledge that the railroad had insufficient  
8 property rights to grant the pipeline easements tends to show Defendants had a  
9 motive to conceal their illegal use of the subsurface from the true owners of the  
10 land (the adjacent landowners) which undercuts Defendants' limitations and laches  
11 defenses. In fact, as to this point, there are at least three letters from the railroad's  
12 in-house counsel that show the railroad knew it was giving away property rights it  
13 did not own. Attached hereto as Exhibits A-C are letters indicating the railroad was  
14 aware it had dubious or no legal right to construct the pipeline. These letters, which  
15 are incompatible with Union Pacific's affirmative defense that its "conduct  
16 conformed with all law based upon the state of knowledge at all relevant times,"  
17 were not a product of discovery, but rather were found by Plaintiffs' counsel  
18 combing the underlying record in the Rent Action. *See* Doc. 135 at 24-25. These  
19 letters provide a reasonable basis to expect there are additional documents showing  
20 Union Pacific's intent to deprive the adjoining landowners of their property  
21 without compensation. Consequently, Union Pacific is simultaneously denying  
22 Plaintiffs' claim that Union Pacific knew it did not have sufficient property rights  
23 in its subsurface to operate, construct, and maintain the petroleum pipeline and at  
24 the same time blocking the discovery to prove this claim—Union Pacific cannot  
25 have it both ways. *See* Doc. 135 at ¶ 60.

26       Plaintiffs' Request 28 seeks communications between the Defendants  
27 regarding the value of the pipeline and right-of-way. These documents also relate  
28



1 to Union Pacific's property interests in the right-of-way and Plaintiffs' request for  
 2 damages. With regard to damages, for example, Plaintiffs' inverse condemnation  
 3 claim requires evidence of the value of property taken without just compensation.  
 4 Similarly, rent payments and other benefits exchanged between Defendants relate  
 5 to Plaintiffs' quasi contract claim. Perhaps most importantly, because Defendants'  
 6 corporate history is linked, this request is tailored to uncover evidence that the  
 7 railroad undercharged the pipeline companies for the use of the subsurface. This  
 8 type of evidence is likely to be found in communications between the  
 9 Defendants—not formal agreements. For example, if the railroad told the pipeline  
 10 company that “these pipeline easements are worth a lot more than what you are  
 11 paying,” this communication would support Plaintiffs' claim for unjust enrichment  
 12 damages because the pipeline companies were not paying fair market value for the  
 13 use of Plaintiffs' and class members' land.

14 As a result, because these two requests seek highly relevant documents, the  
 15 proportionality analysis strongly favors production of these responsive documents.

## 16 **2. Union Pacific Acknowledges the Importance of the Issues at Stake**

17 Defendants have taken Plaintiffs' and the Class's property without  
 18 permission or compensation. The unjustified and uncompensated taking of vast  
 19 amounts of real property across several western states is undoubtedly significant to  
 20 the injured landowners and the public. Union Pacific agrees the issues raised in this  
 21 lawsuit are important, as it recently told this Court the issues “raise policy concerns  
 22 of broad national significance” and that an adverse decision against the railroad  
 23 may impair “critical infrastructure” that “could inflict[] harm on the public” and  
 24 “could have important consequences for the United States.” Doc. 181-1 at 18-19;  
 25 *see also* Doc. 148 (recognizing the “important issues” raised in this lawsuit).  
 26 Therefore, there is no dispute the issues at stake in this lawsuit are important.



### 3. The Amount in Controversy is Undisputably Large

Plaintiffs alleged they are entitled to recover actual damages, exemplary and/or punitive damages, restitution, costs, attorneys' fees, pre- and post-judgment interest, a declaration that they are the true owners of the property underneath Union Pacific's right-of-way and that Defendants cannot profit or collect rent from the land owned by Plaintiffs, quiet title in the subsurface real property in the Plaintiffs' names free and clear of any claimed interests of Defendants, and possession of their real property. While the computation of damages is premature, Plaintiffs are entitled to recover, among other things, the rent payments Union Pacific collected from Kinder Morgan for the illegal use of Plaintiffs' properties and other benefits and profits unjustly received and retained by Defendants. In this regard, Plaintiffs are entitled to their portion of the fair market value rent for the purported easements as determined by the trial court's judgment in the Rent Action—\$14,080,487 annually in rent from January 1, 2004 to the present, and tens of millions of dollars in prejudgment interest. Moreover, the requested discovery is likely to uncover the monetary benefits and profits retained by Defendants, including the below market value rent that was charged to Kinder Morgan when Defendants were sister entities.

Furthermore, Kinder Morgan's expert in the underlying litigation opined that the alleged easements were valued at about \$195 million on January 1, 2004. Like the wrongly retained rent payments, Plaintiffs would be entitled to recover a substantial share of this value as just compensation for the illegal taking of their land by Defendants. Union Pacific cannot dispute that this proportionality factor weighs in favor of production of the discovery sought.

### 4. Only Defendants have Access to the Requested Discovery

The requested discovery seeks negotiations and communications between Defendants, and thus, only Defendants are likely to possess responsive documents.

Hence, this factor also supports compelling Union Pacific—who might be the only party with access to the requested information—to produce responsive documents.

**5. Union Pacific has Sufficient Assets to Respond to the Discovery**

According to its 2016 SEC filings, Union Pacific has over \$50 billion in assets and takes in more than \$20 billion in operating revenue annually. *See* Union Pacific Corporation 2016 Form 10-K [http://www.up.com/cs/groups/public/@uprr/@investor/documents/investordocuments/pdf\\_up\\_10k\\_02062016.pdf](http://www.up.com/cs/groups/public/@uprr/@investor/documents/investordocuments/pdf_up_10k_02062016.pdf) at 22 (last visited July 11, 2016). Consequently, there is little question that Union Pacific has sufficient resources to comply with Plaintiffs’ discovery requests, if it chooses (or is compelled) to do so. To date, Union Pacific has made absolutely no showing of any specific burden (either in terms of time or money) imposed by the requested discovery.

**6. Any Burden and Expense is Far Outweighed By the Importance of the Discovery**

Union Pacific has made no effort to search for communications between it and the pipeline defendants regarding Union Pacific’s title and the value of the pipeline. Yet, Union Pacific expended the time and energy to unearth hundreds of letters and other correspondence from its archives spanning half a century to prove it is using diesel fuel from the pipeline. Union Pacific believes these records bolster its theory that leasing its subsurface for commercial profit could be a railroad purpose. *See, e.g.*, Doc. 148 at 7 and Doc. 181-1 at 13. A few examples of these letters and other documents Union Pacific dug up are attached hereto as Exhibits D-I.<sup>4</sup> What is good for the goose should be good for the gander, and thus,

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<sup>4</sup> Counsel for Plaintiffs conferred with counsel for Union Pacific about Union Pacific withdrawing its “Confidential” designations for Exhibits D-I made pursuant to the Stipulated Protective Order. *See* Declaration of Ethan M. Lange at ¶ 4. Counsel for Union Pacific agreed and withdrew the confidential designations for Exhibits D-I. *See id.* Accordingly, no motion to file Exhibits D-I under seal is necessary.

1 Union Pacific should be required to put forth the same effort in searching its  
2 records for the requested discovery as it did to recover the documents it believes  
3 would support its claims and defenses.

4 Additionally, in this instance, narrowing the scope of the requests does not  
5 impact Union Pacific's alleged burden. Again, Union Pacific is refusing to search  
6 for responsive documents because it claims those documents are stored in  
7 hardcopy format in boxes in offsite storage facilities. So, even if the scope of the  
8 requests are narrowed, Union Pacific's purported burden remains unchanged, as it  
9 would still be required to search through the same boxes to locate a narrower scope  
10 of documents.

11 Alternatively, Plaintiffs are willing to shoulder Union Pacific's purported  
12 burden by searching the boxes that may have responsive materials. In other words,  
13 instead of compelling Union Pacific to search for and produce responsive  
14 documents, this Court could permit Plaintiffs to inspect the documents—then  
15 Union Pacific's alleged burden would be alleviated. Under this scenario, Union  
16 Pacific would not waive its ability to claw back documents it asserts are privileged.  
17 *See* Doc. 127; *see also* Doc. 124. Therefore, Union Pacific's burden and expense  
18 objections should not be a barrier to Plaintiffs obtaining this highly relevant  
19 discovery.

#### 20 IV. CONCLUSION

21 For the reasons stated herein, Plaintiffs respectfully request that this Court  
22 order Union Pacific to conduct a reasonable search of its records, as required by  
23 the Federal Rules, and produce documents responsive to Plaintiffs' Requests 9 and  
24 28, or alternatively, to permit Plaintiffs the opportunity to inspect documents in  
25 Union Pacific's possession, custody, and control.

DATED: July 12, 2016

Respectfully submitted,

/s/ Barrett J. Vahle

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